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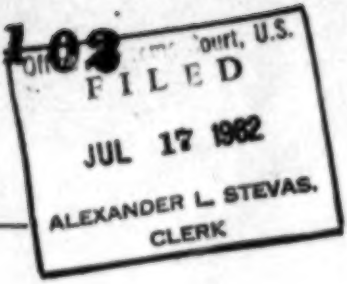

No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Foy Haskell Dawkins and
Mary Lorena Dawkins, Petitioners,

v.

Jody Dawkins Fenslage, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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No.____

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SUPREME COURT OF THE UNITED STATES

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v.

Jody Dawkins Fenslage, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Foy Haskell Dawkins and Mary Lorena Dawkins, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled and numbered case on March 24, 1982.

QUESTIONS PRESENTED

1. Whether the evidence was undisputed that the judgment debtors were entitled to a 200 acre rural homestead exemption?

2. The judgment debtors' property having been sold at execution sale pending appeal, the judgment having been affirmed within 90 days of the filing of his petition in bankruptcy, is the transfer thereby validated a voidable preference under Bankruptcy Code, 11 U.S.C. §§522, 547?

3. Whether the debtors' right to jury trial on the homestead issue was illegally denied them?

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unreported. It is copied in the Appendix, infra, page 30. The judgment of the Court is copied in the Appendix at page 37. Opinions of the District Court for the Northern District of Texas, Amarillo Division, and of the Bankruptcy Court in that Division, are copied in the Appendix at pages 41 and 47 respectively.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals (Appendix, infra, page 37) was entered on March 24, 1982. A timely petition for rehearing was denied on April 21, 1982 (Appendix, infra, page 39). The jurisdiction of the Supreme Court is invoked under 11 U.S.C. 1254 (1). The trial court's judgment and opinion are printed in the Appendix at page 47.

CONSTITUTIONAL PROVISIONS AND STATUTES

11 USC Bankruptcy Code

§522 Exemptions

(b) . . . an individual debtor may exempt from property of the estate . . .

(2) . . . any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition . . . .

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection [b] of this section, if such lien is--

(1) a judicial lien....

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection [b] of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property;. . .

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be

preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of his section or paragraph (1) of this subsection.

. . .

§547 Preferences

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition. . . and . . .

. . .

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

. . .

(e)(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee;

. . .

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days;. . .

. . .

(f) for the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

§550. Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

. . .

§551. Automatic preservation of avoided transfer.

Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to the property of the estate.

ART. 16, TEXAS CONSTITUTION

Sec. 50. Homestead; protection from forced sale; mortgages, trust deeds and liens.

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

§51. Amount and value of homestead; uses

The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars, at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

Art. 3833, Homestead

(a) if it is used for the purpose of a home, or as a place to exercise the calling or business to provide for a family or a single, adult person, not a constituent of a family, the homestead of a family or a single, adult person, not a constituent of a family, shall consist of:

(1) for a family, not more than two hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(2) for a single, adult person, not a constituent of a family, not more than one hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(3) for a family or a single, adult person, not a constituent of a family, a lot or lots, not to exceed in value ten thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon, if in a city, town, or village.

Art. 3835. Interests in land exempt from satisfaction of liabilities.

The homestead of a family or a single, adult person, not a constituent of a family, and a lot or lots held for the purposes of sepulchre of a family or a single, adult person, not a constituent of a family, are exempt from attachment, execution and every type of forced sale for the payment of debts, except for encumbrances properly fixed thereon.

STATEMENT OF THE CASE

Material facts

Acting pursuant to a levy in execution of a federal court judgment the United States Marshal on November 7, 1978, sold 320 acres of Petitioners' farmland. Respondent Jody Fenslage was the successful bidder. Petitioners, against whom the judgment had been entered on August 17, 1978, had perfected an appeal to the United States Court of Appeals, but had not posted a supersedeas bond. On November 6, 1980, the judgment was affirmed. Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir.1980) .

On February 2, 1981, Petitioners filed a Chapter XI Bankruptcy Proceeding in the Northern District of Texas after they had filed in state court a suit to avoid Fenslage's deed, insofar as it conveyed a 200 acre portion of the property claimed to have been their homestead.

In the Debtor's petition conveyance of the land by the U.S. Marshal was alleged to be a voidable preference proposed to be set aside by adversary proceedings.

Respondent caused the state court suit to be removed to the U.S. District Court and it was (in "ten minutes" as counsel for Respondent put it) from there removed to the Bankruptcy Court.

Within seven days of the notice of removal to the United States District Court Petitioner filed pleadings clearly delineating his request for jury trial as such time as the adversary proceeding relating to the homestead issue should come before the Court.

Before hearing was held in the Bankruptcy Court on the homestead issue Petitioners had asserted that the transfer of the proceeding to the Bankruptcy Court from the District Court was premature. It was also apparent that the Petitioners were insisting upon their right to resist the removal of the case to the District Court from the state court and they placed the Court and all parties on notice that at the appropriate time they wished to have the right to trial by jury respected. But the Bankruptcy Judge proceeded to a hearing on all issues and Petitioners were not granted their right of trial by jury on the important homestead issue of the case.

The disposition of the issues before the Bankruptcy Court is clearly set forth in the opinion of the Court of Appeals in the Appendix.

Jurisdiction in the Courts below

Jurisdiction is conferred on the Bankruptcy Court and the United States District Court by Pub. L. 95-598, Title IV, § 405, Nov 6, 1978, 92

Stat. 2686--28 U.S.C. §§1334, 1471. The decision of this Court in Northern Pipeline Const. Co. v. Marathon Pipe Line Co, 50 L.W. 4892 (June 28, 1982), while it holds essential features of this legislation unconstitutional, and while it would perhaps force the conclusion that fundamental error was committed in the proceedings below and in the Fifth Circuit Court, is ordered to have effect only on October 4, 1984. The net effect of the determination that the holding applies prospectively only is that the 1978 Bankruptcy legislation effectively controlled the proceedings below.

ARGUMENT

1. The evidence was undisputed that the judgment debtors were entitled to a 200 acre rural homestead exemption.

There was no dispute in the evidence at the hearing in the Bankruptcy Court that Petitioners had been farming the land and using it for the calling of farming and in order to provide for their family for over 50 years. This use was continued, uninterrupted, before and after the entry of the judgment against Petitioners which triggered the execution sale. The fact that Petitioners physically resided in an urban dwelling rather than on the farm is no impediment to their right to the 200 acre rural homestead exemption under the Texas Constitution.

Petitioners, subsequent to the filing of the abstract of judgment on March 17, 1978, sold their urban residence to their daughter. They later claimed the proceeds of her purchase money note to be exempt under a Texas statute which exempts proceeds of the sale of the homestead from garnishment. Much was made of this in the Bankruptcy Court. It is the only evidence in the record of a claim of the urban residence as the exempt homestead. The undisputed testimony of 50 years of use and occupancy of the rural homestead, and the claim of it as such, however, completely obliterates the contention that the urban residence had been elected by the Petitioners as the single homestead to which they were entitled under Texas law.

A key Texas opinion is Ray v. Metzger, 165 S.W.2d 207 (Tex.Civ.App. 1942) affirmed 172 S.W.2d 480. In this case Defendant had given a deed of trust covering dedicated lots in a rural subdivision. The suit was to foreclose the deed of trust. The defense was that the property was rural homestead. The creditors' attack on the exemption was the theory that the rural homestead had been abandoned by the dedication of the lots, their placement on the market for sale, and that the debtor had thereby limited his homestead to the single lot upon which we was residing when the deed of trust was executed.

Significantly, the debtor in the deed of trust expressly disclaimed all of the lots, except the one as his homestead, and expressly so designated it. The dedication of the subdivision was filed of record on June 16, 1938, and the deed of trust was executed on August 5, 1938. The court said:

". . . . We are also familiar with the line of decisions in this state which in effect hold that if the homestead claimant is in actual possession of and is occupying and using premises for homestead purposes, his declarations and representations (oral or written) to the contrary, will not deprive him of the constitutional protection against encumbrances of the homestead." 165 S.W.2d at 209

The occupancy and use of the rural homestead as a place for the exercise of the family farming business established the rural homestead and Petitioners' contradictory assertion in the matter of the garnishment of their daughter's note affects the case not one whit.

The court further stated:

"Whether or not lands constitute a homestead depends at least to some extent upon the intentions of the owner; perhaps the best evidence of that intention is occupancy and use. When the right once attaches it presumptively continues until abandoned by the claimant. The burden is on the one who asserts abandonment to establish it as a fact by competent and convincing proof.

* * *

"Our courts have jealously guarded the constitutional inhibition of encumbering the homestead except for the purposes therein enumerated. The wisdom of these constitutional provisions cannot be successfully attacked. A sound public policy demands it." 165 S.W.2d at 210.

It was undisputed that the use and occupancy of the rural homestead as contemplated by the Texas Constitution had endured for 50 years and had therefore had its commencement years before acquisition of the urban residence. The burden of proving the abandonment of the rural homestead in order to invest the urban residence with the quality of the single homestead permitted by Texas law was Respondent's. But there was no attempt to meet the burden in any way. Instead the hearing proceeding upon the fallacious notion that the burden was upon the Petitioners to prove that they had abandoned the urban dwelling prior to the filing of the abstract of judgment on March 17, 1978. The date of the sale of this property, March 26, 1978, was therefore deemed conclusive on the entire issue.

The findings of fact and conclusions of law of the Bankruptcy Judge were clearly erroneous.

2. The judgment debtors' property having been sold at execution sale pending appeal, the judgment having been affirmed within 90 days of the filing of his petition in bankruptcy, the transfer thereby validated is a voidable preference under Bankruptcy Code, 11 U.S.C. §547.

If the Court of Appeals had reversed the judgment against Petitioner it is clear that the Marshal's deed would have been an utter nullity.

"The judgment of the trial court may be enforced during the pendency of an appeal therefrom, unless such judgment is suspended by the giving of a proper supersedeas bond, as prescribed by law. Consequently, where the judgment of the trial court is enforced by the party prevailing in that court, and then, subsequently to such enforcement, the appellate court reverses the judgment, the party who received the benefits of prior enforcement of the judgment will then be required to restore such benefits to the party prevailing on the appeal." 6 Tex.Jur.3d 371, citing Stroud v. Casey, 25 Tex. 740, Peticolas v. Carpenter, 53 Tex. 23; Tex. T.R. Co. v. Jackson, 85 Tex. 605, 22 SW 1030; Branigar v. Henderson Hardware Co. (CA 95 SW2d 740; King v. Rubinsky, (CA 253 SW2d 937).

"Furthermore, the Defendant, on or before delivering the property relinquished by him on such prior enforcement of the judgment, is not required to protest or give notice of his intention to appeal. On the contrary, the plaintiff in such a case is charged with notice that the defendant may subsequently take an appeal from the judgment of the trial court. Accordingly, insofar as the plaintiff is concerned in such case, an obligation to refund or restore such

property is deemed to arise at the time of the defendant's surrender thereof." 6 Tex.Jur. 3d. 372, citing Cleveland v. Tufts, 69 Tex. 580, 7 SW 72.

"If a party recovers land in a real property action and takes possession of the property under an execution issued prior to the appeal from the judgment, and if the judgment, on the taking of the appeal is reversed, then, insofar as the rights of the party thus taking possession are concerned, his title is at an end and he may be compelled to relinquish his possession." 6 Tex. Jur. 3d 372, citing Stroud v. Casey, supra.; Liquid Carbonic Co. v. Logan, (CA) 79 SW 2d 632.

These principles are applicable to federal court procedure.

"Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought . . . . " Rule 69 F.R.C.P. . .

11 Bankruptcy Code §547 (e) (1) (A) delays the effectiveness of a transfer of real property until perfection. Perfection is completed

"when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee...." (emphasis supplied)

The title of the purchaser at the execution sale under Texas law is not perfected until the

judgment which supports the sale has become final and nonreviewable. This may occur if the judgment debtor fails to perfect an appeal. It may also occur if the judgment debtor appeals but not until the judgment is affirmed or until the appeal is otherwise disposed of. If the judgment debtor appeals, the deed of the Marshal or the Sheriff is a total nullity insofar as the purchaser at the sale is concerned as well as those persons who take an interest in the property from the purchaser with notice of the circumstances.

"However, an attorney for the plaintiff is not a purchaser without notice within the meaning of this rule. Consequently, a reversal of the judgment will terminate his title." 6 Tex. Jur. 3d 375, citing Stroud v. Casey, supra, Cleveland v. Tufts, supra.

Less than three months before the filing of the debtor's petition, the debtor was still in possession of the property, still farming and ranching, still claiming the property as homestead and still pursuing his rights and remedies provided by law in the pursuit of his claim.

Given the larger perspective of the purposes of the Bankruptcy Code, the avoidance of the Marshal's deed as a preference is clearly consistent therewith. Petitioners sought a Title XI Reorganization only after their unsuccessful appeal had concluded. But their very appeal of the substantial judgment against them was also

aimed at resolution of their debt structure by resistance to the imposition of respondent's claim against them.

The judicial transfer of the property depended upon the occurrence of at least four indispensable events: (1) a valid judgment; (2) levy by the Marshal on the property; (3) sale of the property by the Marshal and the execution and delivery of his deed to the purchaser; and (4) the finality of the judgment, ie., failure of the defendant to appeal it or its affirmance or the dismissal of the appeal.

Much of the discussion in the lower courts dealt with the significance of the abstract of judgment. However, the abstract of the judgment was not at all necessary to the Marshal's sale. Under Texas law, an abstract of Judgment filed in the county records places a lien on the real estate standing in the name of the debtor in the county in which it is abstracted. It does not precipitate a sale nor is it necessary that the judgment be abstracted in order for a sale to occur.

The Marshal must, however, levy on the property if he is to sell it.

He must hold the sale, strike the property off to the highest bidder, and execute a deed to the successful purchaser.

But having done all of this, under Texas law, the title of the purchaser, if the judgment is not yet final, is only a potential title until the judgment becomes final.

The judgment cannot become final unless the judgment debtor fails to perfect an appeal, or if he perfects one the appeal is disposed of, either by affirmance or dismissal. If judgment is reversed, it is as if it never existed.

It cannot be said during the pendency of an appeal that a bona fide purchaser cannot acquire a good title from the judgment debtor. That can only be said after the judgment is affirmed or the appeal dismissed.

And accordingly the last and final essential event in the transfer occurred within 90 days of the filing of the debtor's petition.

Petitioner's effort to secure the avoidance of the transfer by the Marshal's deed was appropriate under XI Bankruptcy Code, §522 (f,g,& h).

In Durrett vs. Washington National Ins. Co, 621 F.2d 201 (5th Cir.1980) an analysis of the transfer of title from a debtor to the holder of a Texas deed of trust by private foreclosure sheds light on the issue in the instant case.

The court first considered the statutory definition of "transfer" in the former Bankruptcy Act:

". . . the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title of property delivered to a debtor shall be deemed a transfer suffered by such debtor." 11 U.S.C. §1(30).

The following quotation from the court's opinion illustrates the point in the instant case.

"The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a 'transfer' by a debtor in possession within the purview of §67(d). The actual transfer of title was made by Durrett to Fields, as Trustee via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern T and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the Trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The 'transfer' within the contemplation of the act was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by §67(d)(2), 11 U.S.C. §107(d)(II)." 621 Fed.2d at 204.

The Durrett case was followed in Abrahamson v. Lakewood Bank & Trust Co., 647 Fed. 2d 547 (Fifth Cir. 1981).

In the case at bar petitioners were still in possession of the real estate sold by the Marshal when they filed their debtor's petition.

3. Petitioners' right to jury trial on the homestead issue was illegally denied.

Petitioners filed on February 27, 1981, their motion and answer to the matters posed by the removal of the state court suit to the federal court. It is the pleading from which the district judge quoted the passages in which Petitioners sought trial by jury. Judge Robinson, and the Fifth Circuit agreed, held that the language used did not constitute a "demand" for jury trial. But the passages:

"Prior to the occasion of a time set for a hearing on an Adversary proceeding, these Debtors are by law permitted an opportunity to then elect whether or not Debtors may desire a trial by jury"

and

"Authorization for an election of trial by jury should be afforded both parties prior to a time setting of an adversary hearing."

must be taken in context. The "Motion and by way of Answer" in which the passages appear

was a response to the pleadings of Respondent in the removed state court suit. That pleading was an answer and counterclaim to the petition filed by these Petitioners and it sought a declaration of title and the cancellation of Petitioners' claim thereto as a cloud on title.

But there were multiple parties in the state court proceeding. Respondent's attorneys were parties, they having taken assignments of interests in the land in satisfaction of contingent fees for which they had contracted.

Also included in the litigious barrage of pleadings, charges, denials, allegations, and counter-demands were motions to lift the automatic stay of the Bankruptcy Code triggered by the debtors' petition, motions to dismiss the Title 11 proceeding, and the like. Petitioners sought to bring order out of the considerable confusion by placing before the Bankruptcy Judge the proposition that his undertaking the adjudication of all matters potentially placed before his would be premature.

Petitioners sought by their pleadings his ruling on essentially the following questions, each of which was necessarily to be resolved before further proceedings:

Which of the adversary proceedings removed to the district court and then "within 10 minutes" removed to the bankruptcy court were to be adjudicated in the bankruptcy court?

To what extent were the Respondent's attorneys, as her assignees and grantees, before the court for the adjudication proposed to be made?

Was the removal of the state court proceeding by Respondent, Petitioners' judgment creditor, an act forbidden by the automatic stay of the Code?

Was the affirmance of the Fenslage judgment against Respondents within 90 days of the filing of the bankruptcy petition the last event of a "transfer" as contended elsewhere in this petition for certiorari?

There were others, but these contentions were of such a nature that any one of them, if the Bankruptcy Judge had sustained Petitioner, would have resulted in substantial repleading of the issues and the claims and demands to be litigated subsequently, if ever.

That the Bankruptcy Judge eventually overruled Petitioners' contentions is of no moment in the consideration of the sufficiency of the request for jury trial. In the context of the status of the case at that time the manner of the articulation of the request, the choice of phrasing, and the reference to the "election" as a future matter to be attended to, do not detract from the clear and unequivocal message given by counsel to the court and opposing counsel that Petitioner, when the time should come for a trial on the fact issue of homestead, demanded jury trial.

In the face of this reality it was patent error for the district judge and the Court of Appeals to hold that Petitioners had not requested jury trial.

This Court said in Dairy Queen v. Wood, 369 U.S. 469, 8 L.Ed2d 44, 82 S.Ct. 894 (1962)

"But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." 369 U.S. at 478

And, citing the Dairy Queen case, the Second Circuit in Robine v. Ryan, 310 F.2d 797 (1962). said

"It is equally clear from that case that ambiguities and inelegancies in a pleading will not defeat a demand for jury trial so long as it reasonably appears that the substance of what is pleaded constitutes a claim for relief at law."

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

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Attorneys for Petitoners

By: _____

CERTIFICATE OF SERVICE

I, E. Byron Singleton, a member of the Bar of the Supreme Court of the United States and one of counsel of record for Petitioners herein hereby certify that on the 16 day of July, 1982, pursuant to Rule 33 of the Supreme Court Rules, I served three copies of the foregoing petition for writ of certiorari on the Respondent as follows:

By depositing such copies in the United States Post Office, Amarillo, Texas, with first class postage prepaid, properly addressed to the post office address of Cary Schacter, of Whittenburg, Whittenburg & Schacter, attorneys of record for Respondent, Jody Dawkins Fenslage, towit: P.O. 31718, Amarillo, Texas, 79120.

All parties required to be served have been served.

Dated July 16, 1982.

_____

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One of counsel for
Petitioners